

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
SIMPSON TIMBER COMPANY,

Appellant,

vs.

OLYMPIC AIR POLLUTION
CONTROL AUTHORITY,

Respondent,

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY and
DEPARTMENT OF NATURAL
RESOURCES, and PUGET SOUND
AIR POLLUTION CONTROL
AGENCY,

Amicus Curiae.

PCHB No. 178

ORDER

Having carefully considered the briefs submitted in accordance with the agreement reached at the pre-hearing conference held on October 19, 1972, the Pollution Control Hearings Board is of the opinion that the burning permit from the Department of Natural Resources relied upon by

1 the appellant Simpson Timber Company, did not absolve it from complying
2 with Section 9.03 of Regulation I of the Olympic Air Pollution Control
3 Authority relating to visual emissions.

4 From which it follows that the Motion of the appellant Simpson
5 Timber Company to Dismiss the "Notice of Violation--Citation" Number 116
6 heretofore served upon it by the Olympic Air Pollution Control Authority
7 should be, and it is hereby denied.

8 DONE at Olympia, Washington this 7th day of February, 1973.

9 POLLUTION CONTROL HEARINGS BOARD

10 Walt Woodward
11 WALT WOODWARD, Chairman

12 W. A. Gissberg
13 W. A. GISSBERG, Member

14 James T. Sheehy
15 JAMES T. SHEEHY, Member

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
SIMPSON TIMBER COMPANY,)
Appellant,)
vs.)
OLYMPIC AIR POLLUTION)
CONTROL AUTHORITY,)
Respondent,)
STATE OF WASHINGTON,)
DEPARTMENT OF NATURAL RESOURCES,)
Intervenor,)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY, and)
PIGMY SOUND AIR POLLUTION)
CONTROL AGENCY,)
Amicus Curiae.)

PCHB No. 178

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THIS MATTER being an appeal of a \$250.00 civil penalty for an
alleged illegal emission violation of respondent's Regulation I; having
come on regularly for hearing before the Pollution Control Hearings

1 Board on the 17th day of May, 1973, at Issaquah, Washington; and appeal
2 Simpson Timber Company, appearing through its attorney, Gerald L. Fletcher
3 respondent Olympic Air Pollution Control Authority appearing through
4 its attorney, Fred D. Gentry; intervenor Washington State Department
5 of Natural Resources appearing through its attorney, T. Reinhard G. Wolf
6 amicus curiae Washington State Department of Ecology through its
7 attorney Wick Dufford and Puget Sound Air Pollution Control Agency
8 appearing through its attorney, Keith D. McCoffin; and Board members
9 present at the hearing being Walt Woodward, W. A. Gissberg, and James T.
10 Sheehy. Since that time, Board member James T. Sheehy resigned and Mary
11 Ellen McCaffree replaced him on this Board. The Board having considered
12 the transcript, the arguments, the exhibits, the briefs of the parties,
13 the exceptions filed and denied the exceptions filed, records and files
14 herein and having entered on the 26th day of December, 1973, its Second
15 Proposed Findings of Fact, Conclusions of Law and Order; and the Board
16 having served said Second Proposed Findings, Conclusions and Order upon
17 all parties herein by certified mail, return receipt requested and
18 twenty days having elapsed from said service; and

19 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said Second Proposed
20 Findings of Fact, Conclusions of Law and Order, dated the 26th day of
21 December, 1973, and incorporated by this reference herein and attached
22 hereto as Exhibit A, are adopted and hereby entered as the Board's
23 Final Findings of Fact, Conclusions of Law and Order herein.

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27 FINAL FINDINGS OF FACT,
CONCLUSIONS AND ORDER

1 DONE at Lake, Washington this 5th day of September, 1974.

2 POLLUTION CONTROL HEARINGS BOARD

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4 W. A. GISSBERG, Member

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7 MARY ELLEN MCCAFFREE, Member

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27 FINAL FINDINGS OF FACT,
28 CONCLUSIONS AND ORDER

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
SIMPSON TIMBER COMPANY,

Appellant,

vs.

OLYMPIC AIR POLLUTION
CONTROL AUTHORITY,

Respondent,

STATE OF WASHINGTON,
DEPARTMENT OF NATURAL RESOURCES,

Intervenor,

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY, and
PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Amicus Curiae.

PCHB No. 178

SECOND
PROPOSED FINDINGS OF FACT,
CONCLUSIONS AND ORDER

This matter, the appeal of \$250.00 civil penalty for an alleged
visual emission violation of respondent's Regulation I, came on for
hearing before the then Board members at Lacey, Washington, on

EXHIBIT A

1 May 17, 1973.

2 Appearances were: Gerald L. Whitcomb, appellant; Fred D. Gentry,
3 respondent, and T. Reinhard G. Wolff, intervenor. Keith D. McGoffin,
4 counsel for Puget Sound Air Pollution Control Agency, amicus curiae,
5 was present but took no part in the proceedings. Richard Reinertsen,
6 Olympia court reporter, recorded the proceedings.

7 At the outset, the Order issued by the Board in this matter on
8 February 7, 1973 was vacated.

9 On July 3, 1973, the Board member and chairman, Walt Woodward,
10 and the then Board member, James T. Sheehy, agreed on proposed Findings
11 of Fact, Conclusions and Order which were thereafter provided to the
12 parties. Since that time, Board member James T. Sheehy has resigned
13 and Mary Ellen McCaffree has replaced him on this Board.

14 Having considered the transcript of the hearing, the arguments
15 thereon, the exhibits, the briefs of the parties, the exceptions filed
16 herein, and otherwise being fully advised in the premises, the Pollution
17 Control Hearings Board makes and enters these second

18 PROPOSED FINDINGS OF FACT

19 I.

20 On August 1, 1972 appellant (Simpson) was issued a burning permit
21 by the Department of Natural Resources (DNR) authorizing Simpson to
22 burn 78 acres of slash on its property about nine miles westerly of
23 Olympia in Thurston County. The permit was issued for a burn for the
24 purpose of abating a forest fire hazard and for the preparation of the
25 site for reforestation. The permit was conditioned, for purposes
26 relevant to this appeal, upon and subject to its automatic suspension

27 SECOND PROPOSED FINDINGS,
CONCLUSIONS AND ORDER

"during any stage of an air pollution episode, as defined in
RCW 70.94.710-730, when declared by the Department of Ecology.

II.

The permit issued by DNR was in compliance with its smoke management procedures and plan and the permit was exercised and the burn conducted by Simpson on August 1, 1972 in accordance with a specific plan for the burn which had been approved by DNR in accordance with all conditions of the permit.

III.

The permit was issued by an authorized DNR employee at the site of the burn only after DNR had notified the Department of Ecology of the facts of the burn and after consideration had been given to the current weather and forecast thereof. No air pollution episode was forecast by the Department of Ecology. It was anticipated by DNR that the smoke and particulate from the burn would rise vertically and become mixed in a cloud base at 2,500 feet and stay at that level and disperse in an easterly movement without being noticed by Olympia residents. However, contrary to the planned and anticipated results of the burn, smoke and particulate did come down in Olympia despite the plan of DNR to prevent that occurrence.

IV.

The burn was the source of a heavy fallout, in midafternoon of August 1, 1972, in and near the city of Olympia, on property of persons other than Simpson, of "fly ash" or particulate of a size up to one quarter of an inch in diameter and of such numbers so as to be individually readily visible falling from the sky. The fly ash or

1 particulate fell upon and into the interior of automobiles with such
2 density as to cause them to have to be cleaned and was accompanied by
3 smoke and the strong smell of smoke in the air. Such fallout did
4 constitute an annoyance to some citizens of Olympia.

5 V.

6 Section 9.03(c) of respondent's Regulation I makes it unlawful for
7 any "person to cause or allow the emission of particles of such size
8 and nature as to be visible individually in sufficient number to cause
9 annoyance to any other person . . . if such particles fall on real
10 property other than that of the person responsible for the emission."

11 VI.

12 Respondent issued to appellant Notice of Violation No. 116, citing
13 Section 9.03 of respondent's Regulation I. In connection therewith, a
14 civil penalty assessment of \$250.00 subsequently was served on appellant
15 by respondent. The notice of violation and the penalty are the subjects
16 of this appeal.

17 From these Proposed Findings, the Pollution Control Hearings Board
18 comes to these

19 PROPOSED CONCLUSIONS

20 I.

21 The essential issue of law in this case may be stated as: does
22 the regulation of a slash burn, by the Department of Natural Resources,
23 pursuant to and consistent with the Washington Clean Air Act
24 (RCW 70.94.660, et seq.) preclude the local air pollution control
25 authority from issuing a citation to the permit holder for the
26 violation of local particulate emission standards?

27 SECOND PROPOSED FINDINGS,
CONCLUSIONS AND ORDER

1 We believe that the question must be and is answered in the
2 affirmative. We adopt the reasoning of the then minority opinion
3 contained in the proposed Findings of Fact and Conclusions of Law
4 dated July 3, 1973, which have heretofore been provided to the parties.

5 II.

6 RCW 70.94.660, the section in point here, prescribes a different
7 regulatory scheme for fires to abate forest fire hazards, prevent fire
8 hazards, instruct public officials in methods of forest fire fighting
9 and for silvicultural operations to improve forest lands. It was the
10 legislative intent to, in effect, preempt the field in these special
11 areas by prescribing these specific and special regulatory schemes.

12 This was in view of the competing public interest involved; i.e., forest
13 fire prevention versus air quality. Thus, when the appropriate
14 procedures are followed under RCW 70.94.660 et seq. in appropriate cases,
15 such as was undisputably the case here, any local air pollution control
16 authority regulations do not apply. This is particularly true since
17 other authorities depend upon the Clean Air Act for their authority and
18 the Department of Natural Resources has the exclusive authority to issue
19 the type of burning permit here involved. Respondent does not have
20 authority to issue slash burning permits and does not claim authority.

21 III.

22 RCW 70.94.690 provides for cooperation between DNR and other air
23 pollution control authorities to avoid duplicating inspections and
24 separate permits " . . . in the regulation of outdoor burning not
25 included in RCW 70.94.660 . . .". That language indicates that the
26 legislature did not contemplate that duplication was involved in regards

1 to permits issued under RC: 70.94.660. Thus, the legislative intent in
2 enacting .660 was to prescribe a special regulatory burn scheme that
3 preempted the field in these special areas.

4 Appellant was not in violation of the Clean Air Act of the State
5 of Washington nor, under the facts of this case, was it in violation of
6 Section 9.03(c) of respondent's Regulation I.

7 Therefore, the Pollution Control Hearings Board issues this

8 PROPOSED ORDER

9 The appeal is sustained and the Notice of Violation and the civil
10 penalty are reversed and ordered stricken.

11 DONE at Lacey, Washington this 26th day of December 1973.

12 POLLUTION CONTROL HEARINGS BOARD

13 W. A. Gissberg
14 W. A. GISSBERG, Member

15 Mary Ellen McCaffree
16 MARY ELLEN MCCAFFREE, Member

17
18 MINORITY OPINION

19 I dissent.

20 The cardinal issue in this matter is posed by this question: Does
21 the issuance of a valid burning permit by the State Department of
22 Natural Resources carry with it a right to pollute to the extent that
23 local air pollution control regulations are violated?

24 Section 9.03(c) of respondent's Regulation I is a clear and concise
25 statement which makes it unlawful to cause emission of particulants which
26 annoy persons or cause fallout on the real property of persons other than

27 SECOND PROPOSED FINDINGS,
CONCLUSIONS AND ORDER

those responsible for the emission. There are four exemptions, none of which forgive particulant emissions caused by a slash burn fire.

Appellant, confronted by the thoroughly justifiable civil penalty levied for the widespread annoyance which it caused in Olympia and environs on August 1, 1972, cannot waive intervenor's permit as an absolution.

The permit has nothing to do with it. That permit was no more a license to pollute than a permit to carry a firearm is a license to disturb the peace or to commit murder.

I cannot conceive that the Legislature intended that RCW 70.94.660 should be interpreted as a license to violate local air pollution control regulations.

The appeal should be denied, and Notice of Violation No. 116 and the civil penalty of \$250.00 should be sustained.


WALT WOODWARD, Chairman

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POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
SIMPSON TIMBER COMPANY,

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OLYMPIC AIR POLLUTION
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STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY, and
PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Amicus Curiae.

PCHB No. 178

FINDINGS OF FACT,
CONCLUSIONS AND ORDER

This matter, the appeal of \$250.00 civil penalty for an alleged
visual emission violation of respondent's Regulation I, came before all
members of the Pollution Control Hearings Board (W. A. Gissberg,

presiding officer) in the Board's conference room at Lacey, Washington
on May 17, 1973.

Appearances were: Gerald L. Whitcomb, appellant; Fred D. Gentry,
respondent, and T. Reinhard G. Wolff, intervenor. Keith D. McGoffin,
counsel for Puget Sound Air Pollution Control Agency, amicus curiae,
was present but took no part in the proceedings. Richard Reinertsen,
Olympia court reporter, recorded the proceedings.

At the outset, the Order issued by the Board in this matter on
February 7, 1973 was vacated.

Witnesses were sworn and testified. Exhibits were admitted.
Closing arguments were made. Briefs were filed by all parties and
amicus curiae.

From testimony and arguments heard, exhibits examined and briefs
considered, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I.

In the afternoon of August 1, 1972, from a 78-acre slash-burn fire
ignited by appellant on appellant's land about nine miles west of Olympia,
Thurston County, there was emitted a plume which produced a heavy pall
of smoke and a massive fallout of fly ash over a large area of Olympia
and environs. The smoke caused alarm to some patients in an Olympia
hospital. Fly ash was deposited on many parked automobiles in Olympia,
causing annoyance to the operators of those vehicles. During the
afternoon of August 1, 1972, respondent received scores of complaints
from residents of Olympia and nearby Lacey concerning eye irritation
caused by the smoke and the annoyance of fly ash covering automobiles,

FINDINGS OF FACT,
CONCLUSIONS AND ORDER

1 costs and other real property.

2 II.

3 An inspector on respondent's staff, after observing the smoke and
4 fallout in Olympia and after tracing the plume to the slash fire, issued
5 to appellant Notice of Violation No. 116, citing Section 9.03 of
6 respondent's Regulation I. In connection therewith, a civil penalty
7 assessment of \$250.00 subsequently was served on appellant by respondent.
8 That penalty is the subject of this appeal.

9 III.

10 Section 9.03(c) of respondent's Regulation I makes it unlawful to
11 cause or allow the emission of particles of such size and nature as to
12 cause annoyance to persons other than the person responsible for the
13 emission and to fall on real property other than that of the person
14 responsible for the emission.

15 IV.

16 Appellant sought from and was granted by intervenor a burning permit
17 pursuant to RCW 70.94.660. This permit was in effect at the time the
18 fire was ignited. Appellant filed a burning plan and otherwise complied
19 with intervenor's regulations governing the issuance of the permit.

20 From these Findings, the Pollution Control Hearings Board comes
21 to these

22 CONCLUSIONS

23 I.

24 Although the briefs filed by the parties in this matter discuss
25 many legal considerations, we think only one relatively simple issue
26 is involved. It can be posed by this question: Does the issuance of

27 FINDINGS OF FACT,
CONCLUSIONS AND ORDER

1 a valid burning permit by the State Department of Natural Resources
2 carry with it a right to pollute to the extent that local air pollution
3 control regulations are violated?

4 II.

5 There is no issue here of appellant being required to obtain from
6 another agency of government--such as respondent--another permit.
7 Respondent does not have authority to issue slash burning permits and
8 does not claim such authority.

9 III.

10 There is no issue here as to whether intervenor erred in granting
11 appellant the slash burn permit. Intervenor acted in good faith and,
12 presumably, in good judgment pursuant to its authority under RCW
13 70.94.660 in issuing the permit.

14 IV.

15 At one time the State's Clean Air Act carried an exemption which
16 clearly absolved persons holding valid burn permits from air pollution
17 requirements of the Act. But in 1971, that exemption was repealed.

18 V.

19 Meanwhile, and on August 1, 1972, there existed Section 9.03(c)
20 of respondent's Regulation I. It is a concise and clear statement which
21 makes it unlawful to cause the emission of particulants which annoy
22 persons or cause a fallout on the real property of persons other than
23 those responsible for the emission. There are four exceptions to
24 Section 9.03(c), none of which forgive particulant emissions caused by
25 a slash burn fire.

26 FINDINGS OF FACT,
27 CONCLUSIONS AND ORDER

VI.

Appellant, when confronted with the widespread annoyance caused in Olympia and environs on August 1, 1972 by particulant matter being emitted by its slash burn fire, cannot wave intervenor's permit as an absolution for that annoyance. The permit has nothing to do with it; the permit is not a license to pollute any more than a permit to carry a firearm is a license to disturb the peace or to commit murder.

VII.

Appellant was in violation of Section 9.03(c) of respondent's Regulation I on August 1, 1972 as cited by respondent's Notice of Violation No. 116 and the subsequent civil penalty of \$250.00 issued in connection therewith is reasonable.

Therefore, the Pollution Control Hearings Board issues this

ORDER

The appeal is denied and the civil penalty of \$250.00 is sustained.

DONE at Lacey, Washington this 3rd day of July, 1973.

POLLUTION CONTROL HEARINGS BOARD

Walt Woodward
WALT WOODWARD, Chairman

JAMES T. SHEEHY, Member

MINORITY OPINION

I dissent. Appellant, desiring to prevent a fire hazard and engage in silvicultural operations to improve its forest lands, sought and obtained a burning permit from the Department of Natural Resources, the Agency which has the sole and exclusive authority to issue a permit for

FINDINGS OF FACT,
CONCLUSIONS AND ORDER

1 | such purposes. See RCW 70.94.660.

2 | That statute declares a fire of the type set by appellant as being
3 | "for the protection of life or property and/or in the public welfare."
4 | Additionally, the statute requires that the issuance and use of such a
5 | permit as appellant's, to be conditional, and it was, so as to comply
6 | with air quality standards established by the Department of Ecology after
7 | full consultation with the Department of Natural Resources. Nor did the
8 | fire cause the state air quality standards for suspended particulate
9 | matter to be exceeded. Respondent conceded at the hearing the fact that
10 | the permit fully complied with all provisions of RCW 70.94.660.
11 | Nevertheless, respondent says since the fire caused the emission of
12 | particles of such size and nature to be visible individually in sufficient
13 | number to cause annoyance to other persons, a civil penalty can be
14 | exacted from appellant.

15 | In my view, the legislature, by the enactment of Chapter 232 of
16 | the Laws of 1971, Ex. Sess., being RCW 70.94.650 through 70.94.700,
17 | established a method whereby a variance to the Washington Clean Air Act
18 | could be obtained. The legislature having declared that appellant's
19 | permit, when issued, was for the protection of life, or property and/or
20 | in the public welfare, it is inconceivable that it was intended that
21 | such purposes could be frustrated by the imposition of a civil penalty
22 | for an action which was carrying out those purposes.

23 | The majority of this Board correctly point out that at one time
24 | (until the passage of Chapter 232 of Laws of 1971, Ex. Sess.)
25 | appellant's burning would have been exempted from the provisions of the
26 | Clean Air Act. However, they fail to recognize that the shift is one
27 | FINDINGS OF FACT,
CONCLUSIONS AND ORDER

1 from complete exemption to one of special regulation. When the special
2 regulations established by the latest statute for such burning have
3 been met and complied with by a permit holder, the sanctions of the
4 Clean Air Act should not apply. This is perhaps more readily understood
5 by an examination of Section 1, Chapter 232 of Laws of 1971, Ex. Sess.
6 codified as RCW 70.94.650. That section gave special treatment to
7 burning permits issued for instruction in methods of fire fighting. A
8 similar regulatory scheme was established for such purpose, differing
9 only in designating another regulatory agency, namely, the Department
10 of Ecology. If one adopts the reasoning of the majority of this Board,
11 it would follow that if a permit were issued to burn an old dwelling
12 for instruction in methods of fire fighting, the instructor who lit
13 the fire would subject himself to the penalties of the Clean Air Act.

14 In my opinion, the legislature has established for certain classes
15 of fires a special set of regulations which, when followed, excuse or
16 vary what would otherwise be a violation of the Act.

17 I would strike the civil penalty and find appellant had not
18 violated respondent's regulation.

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21 W. A. GISSBERG, Member

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26 FINDINGS OF FACT,
27 CONCLUSIONS AND ORDER